



***THIRTEENTH ANNUAL SPRING
PLANNING AND ZONING CONFERENCE***

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***BASICS FOR THE
ZONING BOARD OF ADJUSTMENT***

GETTING ORGANIZED

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I. ORGANIZATION AND RULES OF PROCEDURE: “NOW WHAT DO I DO?”

A. **MEMBERSHIP.** Why are you here? You are private citizens who have “volunteered” to serve your community.

1. ***Five regular members***, up to 5 alternates (if authorized by the local legislative body); no “ex officio” members; staggered three-year terms. (RSA 673:4)
“...Then, shall thou count to five. No more. No less. Five shall be the number thou shall count, and the number of the counting shall be five. Six shall thou not count, nor either count thou four, excepting that thou then proceed to five. Seven is right out...” (*With apologies to Monty Python*)
2. ***Appointed or elected***, as determined by local legislative body (town meeting/council). For elected boards, the boards themselves appoint their alternates for three-year terms. (RSA 673:6)
3. ***Vacancies***: A person appointed to complete the term of someone who resigned should only serve for the remainder of the resigned person’s term, then the new appointee may be reappointed for a term of three years. (RSA 673:12)
4. ***Designation of Alternates***: During a meeting, the Chairman designates alternates to serve in the place of absent or disqualified regular members (RSA 673:11). Alternates may serve for an individual case or an entire meeting, as necessary.
5. ***Continuity*** of members hearing a case that is continued to another meeting is not required, though it may be desirable. In Fox v. Town of Greenland, 151 N.H. 600 (2004), the Plaintiff challenged a Board member who had missed two of five meetings but had listened to the tapes of the meeting and reviewed the documents submitted. The Supreme Court avoided the issue by dismissing the claim because the member was not asked to recuse himself prior to the vote.

B. RULES OF PROCEDURE

“Every local land use board shall adopt rules of procedure concerning the method of conducting its business. Rules of procedure shall be adopted at a regular meeting of the board and shall be placed on file with city, town, village district clerk or clerk for the county commissioners for public inspection.” (RSA 676:1)

1. ***Keep your rules simple***. For the most part, forget Roberts Rules, which were created for large legislative or parliamentary bodies (no one can follow them, anyway). Think about the manner in which you want your meetings conducted, then craft the bylaws to suit that desire. Include statutory requirements, such as notice and filing deadlines (bylaws are easy to change). For an example, see the OEP ZBA Handbook.
 2. ***Follow your own rules...or else!*** (Appeal of Barbara Nolan, 134 N.H. 723, (1991)) (Violation of its rules by Personnel Appeals Board resulted in invalidation of action by Board).
 3. ***Critical points to include in rules of procedure***.
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- Time limit for filing administrative appeals (RSA 676:5 “Such appeal shall be taken within a reasonable time, as provided by the rules of the board”).
Recommendation: 30 days.
 - Time limit for Board’s decision. *Recommendation: 30 days.* Provide for an extension at the request or permission of the applicant.
 - Joint Hearings. Procedures for joint hearings with other boards. *Mind your own business!* Each board participating in the joint hearing must make its own decision on its own subject matter. If the planning board is involved, the chair of that board runs the joint meeting. (RSA 676:2).
 - Format for hearings.
 - Other procedures specified in ordinance ***validly passed**** by local legislative body, including procedural requirements that are stricter than what is prescribed by statute. (Lavallee v. Britt, 118 N.H. 131 (1978)). * i.e., does not conflict with statute.
 - What do you expect of the applicant? Your rules of procedure should state the level of detail you need to make your decision, which should also be reflected in the list of information provided on the appeal application form. If you require a survey stamped by a licensed land surveyor, then the application should state exactly that. Establishing your expectations at the outset will reduce the applicant’s frustration with the process, and yours with the applicant.
 - Waivers. Include a provision for waivers, if you want the legal right to waive any portion of the rules of procedure. In Daniel v. B&J Realty, 134 N.H. 174 (1991), the Supreme Court held that, lacking waiver authorization, the ZBA could not hear an administrative appeal that was filed one day after the ZBA’s 14 day rule, even though the ZBA found the difference immaterial. But remember, you can’t waive statutory standards—you can only waive your own rules.
4. **Officers.** The board itself determines who its officers are (a chairman is required, and others as the board deems fit). Officers serve for a term of one year. RSA 673:8. Don’t make it a popularity contest—think about who will do the best job. Appropriate officers are Chairman, Vice Chairman, and Secretary/Clerk.
- Can the Chairman Vote? Yes, yes, a thousand times, yes! The chairman can also vote no. The chairman is not the President of the Senate, who only votes to break ties.
5. **Reconsideration.** Include a provision for reconsideration of your decisions. There’s no statutory provision specifically recognizing it, but I believe that any member of the board who voted in the majority on an action should have the ability to correct a mistake. Besides, courts smile upon boards that try to correct their own errors (looking at it another way, most judges ***hate*** dealing with land use cases). My recommendation is that this be treated similar to rehearings (see below).

6. **Consistency and fairness** should be your goal; let applicants know what to expect from you and what you expect from them.

C. STAFF, EXPENSES, AND OTHER COSTS.

1. **Staff and Expenses.** The ZBA is authorized to have staff and make expenditures, but there has to be an approved budget for it. (673:16, I) If the Board of Selectmen retains control of the purse strings, then they also control your ability to retain legal counsel and to hire other staff.
 - Whose lawyer is it, anyway? Conflicts: choice of legal counsel; inter-board disputes. If the Selectmen control the legal budget and only hire a certain attorney—then that person is your lawyer. Inter-board disputes present other issues, but such conflicts will typically be addressed by the lawyers involved, as they're ethically obliged to identify and avoid conflicts of interest.
2. **Costs of Public Notices and Abutter Notification.** The applicant should be responsible for bearing this financial burden, but it is the board's obligation to ensure that the work gets done. The board can collect from the applicant the costs of newspaper notification and certified mailings (return receipt, please!) to abutters and others as required by statute. These expenditures DO NOT have to be approved by the local legislative body. (RSA 673:16, II)
3. **Expert Review of Applications?** RSA 676:4,I(g) authorizes planning boards to hire independent experts at the applicant's expense. It does not specifically provide similar authority to zoning boards of adjustment. Until the Legislature clarifies this point, your zoning ordinance should include a provision authorizing the ZBA to do this. The following was prepared by Attorney Tim Bates, and is as good as any I've seen:

The zoning board of adjustment is hereby authorized to impose reasonable fees upon an applicant for the expense of consultant services or investigative studies, review of documents and other matters that may be required by a particular application. Any such fees shall be subject to the provisions of RSA 673:16.

Absent such language in your zoning ordinance, you should include a similar provision in your rules of procedure. Note that on a complex project which is going to ultimately require planning board approval, even in the absence of a provision in the ordinance, it may be worthwhile exploring with the applicant its willingness to fund a review by experts at the ZBA.

D. SERVICE ON OTHER BOARDS

Members of one board may serve on other boards. *But*, the NH Legislature views the planning board as particularly powerful, so no more than one planning board member may serve on any other municipal board or commission. (RSA 673:7, I) Exceptions to this are where the planning board itself forms a subcommittee (to prepare a master plan), or where otherwise statutorily authorized (capital improvements program committee (RSA 674:5)).

II. CONDUCTING MEETINGS: “MAY I HAVE YOUR ATTENTION...PLEASE?”

A. MEET ONLY WHEN YOU MUST. Avoid member burnout. Zoning boards are only required to meet when there is an appeal filed. RSA 673:10.

B. WHO’S ON FIRST: PLANNING BOARD OR ZBA? This is a frequent issue, as a development proposal may require the approval of both boards. It is generally more sensible for an applicant to go before the ZBA first, because preparation of a ZBA application is cheaper and meeting the standards for approval is often harder than for the planning board. If your board goes first, you can condition an approval upon the approval of the other board.

C. APPEALS ARE THE TRIGGER FOR ZBA ACTION. Administrative appeal, variance, special exception, equitable waiver (technically, a special exception is not an appeal, but that’s a fine legal point).

1. ***Administrative appeal:*** The ZBA has the authority to “Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16...” RSA 674:33, I(a). Such an appeal may be brought by “any person aggrieved by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer.” RSA 676:5
2. ***Who is an “aggrieved person”?*** This is a factual question for the ZBA to determine: proximity, type of change, immediacy of injury are considerations. Compare Weeks Restaurant Corp. v. Dover, 119 N.H. 541 (1979) with Nautilus of Exeter, Inc. v. Exeter and Exeter Hospital, 139 N.H. 450 (1995); Appeal of Londonderry Neighborhood Coalition (EFSEC), 145 N.H. 201 (2000) (standing in energy siting case found to exist where individual demonstrated that he or she has suffered or will suffer an injury in fact); Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment, 149 N.H. 63 (2003) (the definition of “aggrieved person” under RSA 676:5 for appealing decisions to the ZBA is broader than the definition of persons entitled to file a motion for rehearing pursuant to RSA 677:2.
3. ***Appeals*** of planning board (RSA 676:5, III) and historic district commission (RSA 677:17) decisions are administrative appeals—conduct hearings “de novo.” This

means you start from the beginning of the case, hear testimony, and do your own fact-finding.

4. ***Planning Board—Limited Review.*** Review of planning board decisions is limited to the planning board's interpretation or application of the zoning ordinance. The remainder of the planning board's decision should be "hands off" for the ZBA. (RSA 676:5, III) Stated differently, the ZBA can review the planning board's interpretation of the zoning ordinance but not, for example, the planning board's application of its site plan regulations.
5. ***Innovative Land Use Controls—No Review.*** Planning board decisions made under an ordinance adopted pursuant to RSA 674:21 ("innovative land use controls"—this includes impact fees) may not be appealed to the ZBA—they go straight to superior court. (RSA 676:5, III)
6. ***Historic District Commission—Complete Review.*** Appeals of HDC decisions present the ZBA with a significant fact-finding challenge. Unlike other administrative appeals, when hearing an appeal to an HDC decision the ZBA is considering the historic district ordinance, not the zoning ordinance, and this is conducted as a complete de novo review. In essence, it is as if the HDC did not make a decision, and the ZBA is compelled to hear the entire case from its beginning to its end. (RSA 677:17)
7. ***No Freebies.*** The ZBA cannot offer its opinion on a matter without an appeal being filed. Generally, there has to be some adverse decision first, then an appeal, before the ZBA can perform its function (special exceptions are the "special exception" to this rule). The ZBA responds only to specific factual circumstances, not to hypothetical situations. In legal parlance, the ZBA does not have the power to issue declaratory or advisory judgments.

D. EFFECT OF APPEAL TO THE ZBA

Status quo—suspension of the action that is being appealed. An appeal "shall be deemed to suspend such permit or certificate, and no construction, alteration, or change of use which is contingent upon it shall be commenced." There is a narrow exception in cases where there is imminent peril to life, health, safety, property, or the environment. Note, there is no similar "suspension" for subsequent appeals to superior court, except by specific court order. (RSA 676:6)

E. MEETING VERSUS HEARING.

1. ***Meetings*** (RSA 91-A:1) occur whenever the board is gathered to conduct any of its business. All meetings are open to the public, including the ZBA's deliberation portion (you can't sequester yourselves like a jury).
2. ***Hearings*** are a specific part of a meeting, during which the public is invited to testify regarding an application. The board has to hold a meeting to conduct a hearing, and

for development applications or appeals, a hearing must be held before the board can legally make a decision. (RSA 676:7)

F. NOTICE OF PUBLIC HEARING (RSA 676:7)

1. **Abutters.** Five days certified mail advance notice to applicant, abutters, holders of conservation, preservation, or agricultural preservation easements (but see discussion of developments of regional impact, below). Tenn Trustees v. 889 Associates, Ltd., 127 N.H. 321, 330 (1985) (failure to give written notice to an abutter as required by statute did not warrant invalidation of the variance where the failure was not prejudicial to the abutter).
2. **Newspaper.** Five days advance publication in newspaper of general circulation in the area.
3. **Reckoning of Time.** Notice to abutters and in the newspaper does not include the day of mailing but does include the day of the hearing and follows the calendar. (RSA 21:35)
4. **Timing of the Hearing.** The ZBA must hold the hearing within thirty days after receiving the notice of appeal.
 - Thirty days + 5 days = 35 days. That's the math, but if you hold only one meeting per month, there will be situations where you have some conflicting overlap among the filing date, the notice date, and the hearing date. In these situations, request a written waiver from the applicant to extend the time, or hold another meeting. But failure to hold a hearing does not equal approval! (Barry v. Amherst, 121 N.H. 335, 339 (1981) (“...zoning boards may lack adequate incentive to comply with the time requirement contained in [the statute], but this is a legislative and not a judicial problem.”))
5. **Content of Notice.** The public notice must accurately state what will be heard and decided by the board (if someone has applied for a variance and the ZBA figures out that she needs a special exception, deny the variance and ask her to file a new application—don't fudge it!).

G. DEVELOPMENTS OF REGIONAL IMPACT. As a local land use board (RSA 672:7), a ZBA is obliged to determine whether applications before it are “developments of regional impact.” (RSA 36:54 et seq) In such cases, hearing notification to neighboring town and to the regional planning commission must be made (*14 days in advance*, not 5 days like everyone else), and they have the right to testify (but not the right to appeal!). Doubt concerning the potential for regional impact should be resolved in favor of finding such potential.

1. **Criteria for regional impact.** (RSA 36:55) Including, but not limited to, the following:
 - The relative size and number of dwelling units involved (if a subdivision);

- The proximity of the development to a municipal boundary
 - Impact upon transportation networks
 - Anticipated emissions
 - Proximity to regional aquifers or surface waters, and
 - Shared facilities
2. ***The problem of timing.*** Decisions on the potential for regional impact are formal actions of the board. Given that a ZBA typically starts looking at an application for appeal on the same night that it holds the public hearing, there's no time to notify the neighboring municipality and the relevant regional planning commission. If this is the case, you can open the public hearing, take testimony from the applicant and anyone else with an interest in the application, then continue the application until the next month. Then provide notice to the other municipality and the RPC regarding the continued hearing.
3. ***Notification of Board Action:*** Within 144 hours of reaching a decision that a particular application is a development of regional impact, the board must send, by certified mail, to the Regional Planning Commission and the affected municipality, copies of the minutes of the meeting at which time that decision was made. The board must, at the same time, send to the Regional Planning Commission an initial set of plans. The cost for this notification must be borne by the applicant. Mountain Valley Mall Assoc. v. Municipality of Conway, 144 N.H. 642, 653 (2000) (court refused to invalidate planning board approval after finding that municipalities received notice but did not receive copies of minutes).

H. OPENING A MEETING. You must have a quorum (simple majority) of the entire membership, both to open a meeting (RSA 673:10,III) ***and to make decisions.***

1. ***Introduction.*** Develop a standard introduction for the public—it sets the tone for your meeting, and helps guide the public. (**Attachment 2**)
2. ***Oaths and Attendance.*** The ZBA has the authority to administer oaths, and to compel witness to attend a hearing (RSA 673:15), but enforcing attendance would require a court order.
3. ***What if the applicant doesn't show up?*** Although you can make a decision without the applicant present, it's generally better to have him/her there. Open the public hearing, then continue it to the next meeting. Get in touch with the applicant to find out what happened—accident, illness, football playoff—and ensure that he/she knows of the continuation. If the applicant fails to show again, deny the application without prejudice—meaning that it can be resubmitted without change, but upon payment of new fees.
4. ***Who has the right to talk at a hearing?*** Applicant, abutter, owners of “directly affected” property, and of course, the ZBA members. Others at the discretion of the ZBA. (RSA 672:3)

- “Directly affected” property is like the “aggrieved person” standard above; used here for the purposes of testimony, not notice requirement.
- “Yadda, yadda, yadda.” Sure, they have the right to talk, but do you have to listen to them forever? No! Set time limits if you must, and ask people not to be repetitive.
- “Friends, Romans, countrymen, lend me your ears.” A liberal policy is best—let people have their moment before you, but strive to keep them on topic. It’s often more efficient to let everyone speak for a limited period rather than debate who does or does not have standing to speak at the public hearing. *Hooksett Conservation Commission v. Hooksett ZBA*, 149 N.H. 63 (2003) (just because someone is allowed to speak does not mean that they will have standing to appeal the decision).
- Keep it formal. Have the public and applicants address the board from a podium, and have plans posted for the audience to see. Speakers should identify themselves, and state their interest in the application.

I. CONTINUATION. Although most cases can be dealt with in one meeting, continuing hearings for more information is OK.

1. ***Continue the hearing***—not the meeting—to a specific date, time, and place. If the applicant subsequently refuses to submit the information and it is necessary for the decision, deny the appeal.
2. ***Site Walks.*** In many cases a site walk will be helpful for the board. Treat a site walk as a formal part of the hearing process, not as a Sunday picnic. Site walks where there is a quorum of the board present requires public notice—this can usually be accomplished through oral notice during at a regularly scheduled hearing for which notice was provided for the application.

Take minutes, take photographs, ask questions, and stick together.

If the applicant refuses access to the property, then there may be a basis for denial (without prejudice); if the applicant allows the board members access, but not the general public, the board should keep an especially good record of what it did, what it saw, and what was said—but refusal to allow the public to access the site may also be a basis for denial without prejudice.

J. USE CHECKLISTS. For an applicant, the ZBA hearing is often the most difficult point of contact with local government, and this is needlessly so. Let the applicant know what is expected and provide as much *impersonal* guidance as you can (pamphlets describing the appeals process and the standards for review are a good idea).

- K. ASSIST THE APPLICANT.** Remember, not only does the ZBA have to act in good faith, but you have an obligation to assist the applicant. Carbonneau v. Rye, 120 N.H. 96 (1980). The process should not amount to a test of wills or a shell game, especially over questions of procedure.

New Hampshire Constitution, Part I, Article 1. [Equality of Men; Origin and Object of Government.]. All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

1. ***Constitutional Interlude.*** Remember that as a member of the ZBA, you are an official representative of your local government. The Supreme Court has interpreted the foregoing section of the constitution to mean that it is the obligation of local land use boards to assist applicants through the process. Take this point seriously, because it's serious stuff that gets the heart of the meaning of "government by the people."
2. ***Form and Substance.*** It is the function of towns "to provide assistance to their citizens, and that the 'measure of assistance certainly includes informing applicants not only whether their applications are substantively acceptable but also whether they are technically in order.'" Richmond Company v. City of Concord, 149 N.H. 312, 314 (2003) (quoting Savage v. Town of Rye, 120 N.H. 409, 411 (1980)) (the key is that the board's assistance must be "reasonable." The Court rejected Plaintiff's argument that the board was required to comment during the public hearing process on the substance of its application).

L. MAKING A DECISION

1. ***Close the hearing*** and end the public discussion.
2. ***Deliberate.*** Unlike a jury, the deliberations of the ZBA are open to the public. Public comment should be discouraged, but the board may have additional questions, and they should be directed to specific individuals.
3. ***Go around the table.*** If you chair the meeting, be sure to invite comment from every member of the ZBA—not everyone is silver-tongued and confident.
4. ***Personal Knowledge.*** Board members may base their decisions on personal knowledge of the circumstances; e.g., traffic safety ("...that stretch of road always ices up.") or the lay of the land ("Well, the rainwater flows off that hill straight into Fred's basement..."). But be careful not to take this to an extreme. The board may not rely on its factually unsupported conclusions in the face of contrary expert testimony. Condos East Corp. v. Conway, 132 N.H. 431 (1989)
5. ***Findings of fact*** are technically not necessary, but can be extremely helpful to a court reviewing the ZBA's decision. Remember, court appeals of ZBA decisions are based

upon the record you develop! Written findings demonstrate that you've engaged in a thoughtful, deliberate process, rather than relying on gut reactions based in emotion.

6. **Vote.** This may seem obvious, but the manner of voting is important. When considering an administrative appeal, the action to be taken by the ZBA is fairly straightforward—either the action taken by the administrative official was right, or it was wrong—and the board members vote to approve or deny the appeal. In a special exception, either the proposal meets the criteria established by the zoning ordinance, or it doesn't—and the board members vote to approve or deny the appeal. Because of the complex statutory and case law background to variances, however, the approach to voting on this particular species of ZBA action is often muddled by boards. The problem is that many boards think that they have to vote on the individual criteria for variances—not so! Consider the following scenario:

Imagine a case where A, B, and C vote for "no diminution of property values", and D and E vote against. Then B, C, and D vote for "in the public interest", and A and E vote against. Then C, D, and E vote for "unnecessary hardship", and A and B vote against. By the time you're done, the Board as a whole has found each of the five criteria to be satisfied by a 3-2 vote, yet every member of the Board believes that two of the criteria are NOT satisfied—in a straight vote to approve or disapprove the variance, it would have to be defeated 5-0! (With thanks to Neil Faiman, Wilton ZBA Chairman).

Although many boards use worksheets to help members through the complexities of the variance criteria, such aids should not be treated as ballots. Ultimately, each member must decide—with one vote each—whether or not all of the criteria have been met. If you as a member feel that only one of the criteria has not been met, then you must vote against granting the variance.

7. **Votes contrary to the motion.** What happens if a motion is made to approve an appeal, and the vote is 2 in favor, 3 against; is this a denial? Authorities are mixed on this, but my opinion is that this is only a failed motion, not a positive action of a majority of the board. Immediately following such a failed motion, one of the three who voted against it should be obliged to move for denial, with a vote ensuing.
8. **Conditions of approval** should be stated within the motion that embodies the decision of the ZBA.
9. **Be Consistent.** Although each case should be decided on its own merits, try to be consistent. If the zoning ordinance has been regularly interpreted one way in the past, the ZBA may be powerless to change that interpretation.
 - **Administrative Gloss.** What if the zoning administrator consistently applies the zoning ordinance in a particular way that the ZBA later feels is incorrect? ***It may be too late!*** The concept of "Administrative Gloss" is spelled out in Tessier v. Town of Hudson, 135 N.H. 168 (1991), where a series of zoning administrators held to a particular view regarding the application of a "grandfather" clause, a view that the ZBA later counseled a new zoning administrator to ignore. The Supreme Court held that the ZBA could not

change the “administrative gloss” put on the ordinance—only the legislative body of the town could.

10. ***Repetitive Applications = Multiple Denials.*** The earlier denial of an application that is materially the same as a new one precludes the ZBA from reaching the merits of the new application. The applicant must demonstrate changed circumstances affecting the merits of the application. Fisher v. Dover, 120 N.H. 187 (1980). Without such a showing, you can refuse to accept the application of appeal.

M. ISSUANCE OF DECISION (RSA 676:3)

1. ***Timing of Decision.*** Your decision should be made within the time limits you have set for yourselves in your bylaws (remember those?).
2. ***Final written decision*** should be either an approval or a denial. If a denial, then the Board must provide the applicant with written reasons.
3. ***Publicly Available.*** The written decision should be on file in the ZBA office (or town clerk, if there is no such office) for public inspection within 144 hours of action. Such a written decision can be embodied in the minutes of the board. Typically, these will be draft minutes, and should be so labeled.

N. KEEPING RECORDS: files should be organized and based on a system that anyone can understand.

1. ***Tax Map System.*** A system based on tax map/lot numbers, cross referenced by a ZBA case number is a useful approach.
2. ***Research Aids.*** Basing the records on property identification will aid in historical research (“Was it this property that got the variance for the swimming pool back in the early 80s?”)
3. ***Work with Other Local Boards.*** A unified system is especially useful to anyone researching past actions relating to a particular parcel of land, whether the action was by the planning board or the ZBA.

III. REHEARINGS: “WHADDA YA MEAN, YOU DON’T LIKE OUR DECISION?”

A. PURPOSE OF A REHEARING: allows the ZBA to correct its errors before the case goes to court, and for new information or lines of argument to be introduced.

B. MOTION FOR REHEARING

1. ***Timing.*** Motion for Rehearing must be filed within 30 days of the time the ZBA’s decision is made, but if the minutes to the meeting are not available within 144 hours

after the meeting, the petition may amend the motion for rehearing after the 30 day limit has passed. (RSA 677:2)

2. ***Time Reckoned.*** The manner in which the time period for filing a motion for rehearing is computed has changed several times in the last few years. The language at the present time provides as follows:

➤ This thirty day time period shall be counted in calendar days beginning with the date following the date upon which the board voted to approve or disapprove the application in accordance with RSA 21:35

Since Pelletier v. Manchester, 150 N.H. 687 (2004) was decided under a prior version of the statute, it should be disregarded.

3. ***Motion by Whom?*** A motion for rehearing may be filed by the selectmen, any party to the action or “any person directly affected” by the decision. (RSA 677:2) Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment, 149 N.H. 63 (2003) (while RSA 677:4 authorizes the selectmen to request a rehearing, that authority does not extend to the Conservation Commission).
4. ***Basis for Further Appeal.*** A motion for rehearing is a prerequisite for appeal to superior court. (RSA 677:3) The motion for rehearing must state every ground that is alleged as a basis for rehearing, unless good cause is shown. RSA 677:3. Failure to state a ground waives it for appeal to superior court. Dipietro v. Nashua, 109 N.H. 174 (1968). *But see* Colla v. Town of Hooksett, 153 N.H. ____ (01/27/06) (Court found broadly worded motion for rehearing to be adequate).

C. ZBA ACTION ON THE MOTION FOR REHEARING

1. ***Another 30 days.*** Grant or deny the motion within 30 days of it being filed with the board.
2. ***Reasons to grant the motion.*** Grant a rehearing if there is new evidence that was previously unavailable, if the ZBA committed an error, or if a new line of argument is being made. Don’t be afraid to admit an error, but look upon the presentation of “new evidence previously unavailable” with a healthy degree of skepticism. A poorly prepared initial application should not be allowed to be supplemented upon rehearing simply because the applicant didn’t know the board might actually deny it. Reasons for granting a rehearing should be compelling, so as to prevent an injustice.
3. ***Schedule a rehearing.*** If the motion is granted, then schedule a rehearing. The party moving for the rehearing should pay for new public notice publication and abutter notification.
4. ***Scope of Rehearing.*** During a rehearing, the ZBA is not limited to the scope specified in the motion. The ZBA may expand the rehearing of its own accord (“*sua sponte*”) to correct any errors it may have made. Fisher v. Boscowan, 121 N.H. 438 (1981). The Board may also grant the rehearing to correct its original reasoning, yet keep the same result.

IV. DISQUALIFICATION: “MY MOTHER, THE APPLICANT”

A. CONFLICTS OF INTEREST AND THE “JUROR STANDARD” RSA 500-A:12

1. **Disqualification** is appropriate where a member has a direct personal or pecuniary interest in the outcome of a case that differs from the interest of other citizens or where the member would otherwise be disqualified as a juror. RSA 673:14
2. **The “Juror Standard”** (RSA 500-A:12) calls for disqualification where the member
 - Expects to gain or lose upon the disposition of the case;
 - Is related to either party;
 - Has advised or assisted either party;
 - Has directly or indirectly given his opinion or has formed an opinion;
 - Is employed by or employs any party in the case;
 - Is prejudiced to any degree regarding the case; or
 - Employs any of the counsel appearing in the case in any action then pending in the court.
3. **Common sense** should prevail, and the likelihood of a peripheral conflict is much higher with board members than it is with potential jurors. In McLaughlin v. Union Leader Corp., 99 N.H. 492 (1955), the Supreme Court held that

it is not any and every business relation that disqualifies a juror and if it did the newspaper subscriber, the telephone user, the electric and water consumer and those who engage in a host of other common everyday habits of ordinary commercial and domestic life would be eliminated from the average jury panel.
4. **Voluntary action.** Unlike true jurors, disqualification of a ZBA member is typically a voluntary act, except that members who are abutters are automatically disqualified. In Totty v. Grantham, 120 N.H. 388 (1980), the Supreme Court held

the fact of being an abutter is sufficient to disqualify a board member from voting without a showing of actual prejudice.
5. **How do you know?** If you think you may have a conflict, then you probably do. Ask yourself, “Can I be indifferent?” and respond honestly. Don’t let pride interfere with your judgment—the alternate serving in your stead will do a good job, too. Remember that the reputation and credibility of the board are at stake.
6. **You can keep your reasons a secret.** You are not required to divulge the reasons for which you are disqualifying yourself—that’s your business, and no one else’s!
7. **Advisory Vote.** A non-binding vote may be taken at the request of the member or any other board member, prior to any public hearing. **NO ONE ELSE** has the legal right

- to request that a member step down (this won't stop people from complaining, though).
8. ***What happens if you don't?*** If you *should* be disqualified yet participate in the board's decision, you may have tainted the entire decision of the board, and it can be invalidated. This is true even if your vote did not affect the outcome. In Winslow v. Holderness, 125 N.H. 262 (1984), the Supreme Court ***voided a board's decision*** where a newly-appointed member voted on an application after speaking in favor of it at a public hearing prior to his appointment. The Court said that it was impossible to weigh the influence of one member's opinion on that of the other members.

B. "EX PARTE CONTACTS"

1. ***Don't Talk About It.*** Outside the board meeting, avoid discussing any case with other members, applicants, abutters, neighbors, friends, or relatives (but it's OK to talk with your dog about it).
2. ***...hear no evil...*** Decisions must be made upon personal knowledge and upon evidence presented during the public hearing. If someone buttonholes you and gives you information regarding an application, you are obliged to reveal that information to the entire board.
3. ***Quasi-Judicial vs. Administrative Functions.*** "Though a judicial or quasi-judicial act of a municipal body may be voided because of a conflict of interest, [citations omitted] an administrative or legislative act by such a body need not be invalidated if the conflicting interest did not determine the outcome." Michael v. City of Rochester, 119 N.H. 734 (1979). The ZBA almost never engages in legislative or administrative functions, unlike the Planning Board, which faces the role annually when zoning ordinance amendments are proposed.
4. ***You May Testify.*** If you are disqualified, you may testify as a member of the public during the public hearing, but sit in the audience. It may even be better for you simply to leave the room while the board is deliberating the issue.

V. THE RIGHT TO KNOW LAW: “SSSH...IT’S A SECRET...”

A. ALL MEETINGS ARE OPEN TO THE PUBLIC. All meetings of the ZBA are open to the public, including the deliberation portion. (RSA 91-A)

1. *What’s a meeting?* A quorum gathered to discuss and decide the business of the Board.
2. *What’s not a meeting?*
 - Happy Hour. Any chance meeting or a social meeting neither planned nor intended for the purpose of discussing matters relating to official business and at which no decisions are made; however, no such chance or social meeting shall be used to circumvent the spirit of this chapter; and
 - Consultations with legal counsel. RSA 91-A:2

B. MINUTES. Minutes shall be made available to the public within 144 hours

1. *What should be in minutes?* This is really your decision, but they should at least include the actions taken by the board; if you adopt a “bare bones” approach, be sure that your motions include everything that you expect to happen with the application. Minutes that more completely cover the discussion on a matter will probably better serve you, as well as the people sorting through your record, such as judges, future land owners, and your successors on the board. You’ll even find yourself poring over old minutes, trying to remember what you said at a meeting.
2. *Notice.* Meeting notices shall be publicly posted in 2 prominent places at least 24 hours in advance of the meeting, including non-public sessions! ***BUT***, recognize that ***public hearings*** (as opposed to mere meetings) have different notice requirements.
3. ***Lights, camera, action!*** Anyone may record your meetings, but they don’t have the right to make a nuisance of themselves. The board needn’t tolerate klieg lights.

C. NON-PUBLIC SESSION (also known as “executive session”) is appropriate only in very limited circumstances:

1. ***CAUTION!*** You cannot use it just because you’re afraid of hurting someone’s feelings, or because someone has made a vague threat of lawsuit—threats of litigation must be in writing to justify a non-public session. ***Cite the section of the law you’re relying on for a legitimate non-public session, and vote by roll call.***
2. ***TAKE MINUTES***—they should be publicly available as any other minutes, unless the board votes to keep them confidential (but there are limitations here, too!).

VI. DEPARTMENT AND CONDUCT

A. THE GOLDEN RULE

1. ***Fairness.*** Remember and practice basic rules of good behavior and fair play.
2. ***The Golden Rule*** applies: consider how you would want to be treated if you were appearing before a local board, whether as an applicant or as a concerned abutter.
3. ***Make people feel welcome.*** While you as a board member might be perfectly comfortable hearing a case, the applicant before you is likely to be very nervous. For many people, the ZBA is their first personal encounter with a governmental function conducted in a public arena. Try to make them feel more comfortable with the process, even if they don't like the end result.

B. THE “RIGGINS RULES” (Attachment 2)

Yes, they're dated and politically incorrect, as well as being aimed at an entirely male audience, but the essence of the message rings true. They make good reading for the thoughtful board member.

C. THE FIRST QUESTION: WHY ARE YOU HERE?

Remember the constitutional underpinnings of the Supreme Court's command to assist the applicant—this should apply equally to all people appearing before you, whether it's the applicant, an upset abutter, or an interested citizen.

Good luck!

VII. RESOURCES

TEXT

New Hampshire Planning and Land Use Regulation, updated and published annually by LexisNexis, issued by NHOEP, and available at a substantially discounted price through your regional planning commission. This is a compendium of all of the statutes you're likely to need to know while serving on a local land use board.

New Hampshire Practice, Volume 15, Land Use, Planning and Zoning, Peter Loughlin, 2000, Lexis. This treatise is the bible for NH planners and municipal lawyers alike, and is often cited in decisions of the NH Supreme Court.

The Board of Adjustment in New Hampshire ("the ZBA Handbook"), maintained by NHOEP. It is available on-line in a variety of formats at the following location:
www.nh.gov/osp/publications/start.html

Town and City, the monthly magazine of the New Hampshire Municipal Association. Mailed to all member communities, and available by subscription.

The Planning Commissioners Journal, subscribe at www.plannersweb.com/index.html.

TELEPHONE

NH Office of Energy and Planning	271-2155	www.nh.gov/oep
NH Municipal Association (800-852-3358)	224-7447	www.nhmunicipal.org
NH Regional Planning Commissions		
North Country Council	444-6303	www.nccouncil.org
Lakes Region Planning Commission	279-8171	www.lakesrpc.org
Upper Valley Lake Sunapee RPC	448-1680	www.uvlsrc.org
Southwest Region Planning Commission	357-0557	www.swrpc.org
Central NH Regional Planning Commission	226-6020	www.cnhrpc.org
Southern NH Planning Commission	669-4664	www.snhpc.org
Nashua Regional Planning Commission	883-0366	www.nashuarpc.org
Rockingham Planning Commission	778-0885	www.rpc-nh.org
Strafford Regional Planning Commission	742-2523	www.strafford.org

E-MAIL

Plan-Link, an email list service maintained by NHOEP to benefit the NH planning community. To subscribe, follow the instructions at www.state.nh.us/osp/plan-link/start.html

ZONING BOARD OF ADJUSTMENT OPENING STATEMENT

Welcome to this official meeting of the Zoning Board of Adjustment of the [Town/City] of _____. Its members are [appointed/elected] volunteers who serve without any compensation.

The Board consists of five regular members [and ____ alternate members]. Members of the Board are [appointed for three-year terms by the Board of Selectmen/elected for three-year terms by the voters of the town/city].

I will introduce the members to you and as I do, I ask them to raise their hands so you may see who we are. I am _____, the chairman; _____ is the vice chairman. Other regular members are (list all); alternates are (list all). Our staff is composed of (list any).

Three voting members constitute a quorum, which is needed to transact any legal business of the board. The chairman will designate alternate members to vote in place of the regular members when necessary. Actions on appeals require three concurring votes of the Board's members.

This Board holds open meetings, and all those present are invited to stay and listen to the Board's deliberations. During the normal course of business public input is not generally permitted. The Board conducts public hearings for that purpose.

Board members will hold their questions until a speaker who has obtained the floor has stopped speaking. The Chairman will poll the members of the Board for questions in the random order in which they are seated on that particular evening.

This meeting is controlled by the Chairman, whose decisions are final unless overruled by a majority of the Board. The Board should not hear any public input pertaining to matters over which the Board has no jurisdiction. No matter the sentiment, if the testimony is on subjects over which we cannot act, it will be ruled out of order.

It is our hope that all sides of every issue gets to be heard. The Board is not composed of experts in any particular area, and we are all here to listen to your concerns and ideas. We will attempt to do what is right for the community while acting within the [town's/city's] zoning ordinance and the limitations of state law.

PUBLIC HEARING

This public hearing is to get input from the public for the Board to consider. If at all possible, be specific as to the course of action you wish the Board to take regarding your concern. If you are in favor of the project, tell us why. If you are opposed, we need to know on what grounds you feel this Board should take action and what that action might be, in your opinion. We must work within the framework of our [town/city] ordinances and simply "not liking" a project is not a reason enough for refusal. After the applicant has made a presentation, abutters will then be asked to speak, followed by any other town residents and finally any other interested parties.